No. 851

In the Supreme Court of the United States

October Term, 1944.

ELLA HAUSER THATCHER,
Petitioner,

vs.

KATHERINE REBECCA BLACKER and TAYLOR B. WEIR, Executor of the Last Will and Testament of Samuel T. Hauser, deceased,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT
and
BRIEF IN SUPPORT THEREOF

LESTER H. LOBLE,
M. S. GUNN,
of Helena, Montana,
Attorneys for Petitioner.

C. T. BUSHA, JR.,
Great Falls, Montana,
MILTON C. GUNN,
GUNN, RASCH & GUNN,
Helena, Montana,
Of Counsel for Petitioner.

Filed January....., 1945.

....., Clerk.

SUBJECT INDEX

	Pages
PETITION FOR WRIT OF CERTIORARI	**1- 9**
SUMMARY STATEMENT OF THE MATTER INVOLVED	1- 5
QUESTIONS PRESENTED	5- 6
WHETHER THE DECISION OF THE CIRCUIT COURT OF APPEALS IS:	
I. In Conflict with Section 7021, Montana Revised Codes, 1935, and the Decision in In re McLure's Estate, 63 Mont. 536, 541	5- 6
II. A Violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States and in Conflict with the Decisions of This Court in Saunders v. Shaw, 244 U. S. 317, 319, and Georgia R. & Elec. Co. v. Decatur, 295 U. S. 165	6
JURISDICTION	6
REASONS RELIED ON FOR ALLOWANCE OF THE WRIT	7- 9
CERTIFICATE OF COUNSEL	9
BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	**11-25**
I. Opinions of the Court Below	11
II. Jurisdiction	11
III. Statement of the Case	12
IV. Specifications of Error	12
SUMMARY OF THE ARGUMENT	12-13
ARGUMENT	13-25
I. The Conflict with the Law of Montana	13-21

Pages

A. The Decision of the Circuit Court of Appeals Is in Conflict with Section 7021, Montana Revised Codes, 1935..13-18

B. The Decision of the Circuit Court of Appeals is in Conflict with the Decision of the Supreme Court of Montana in In re McLure's Estate, 63 Mont. 536, 541, which is to the effect that heirs at law may not be disinherited except where such intent is expressed in language which is clear and unequivocal 18-21

II. The failure of the Circuit Court of Appeals to remand the case to the District Court for trial, after it has decided that the matters affirmatively alleged in the answer are material, involves a violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and the decision is in conflict with decisions of this Court 21-23

CONCLUSION 23-25

TABLE OF AUTHORITIES CITED

Pages

CASES

Aetna Accident & Liability Co. v. Miller, 54 Mont. 377, 382, 170 Pac. 760 20

Barber v. Pittsburg Ft. W. & C. R. Co., 166 U. S. 83, 109, 41 L. Ed. 925, 936 ..... 7, 18

Colton v. Colton, 127 U. S. 300, 310, 32 L. Ed. 138, 142 18

David v. Robert Dollar Co., (C. C. A. 9), 2 Fed. (2d) 803, 806 22

Erie R. Co. v. Tomkins, 304 U. S. 64, 82 L. Ed. 1188 ..... 6, 7

Forrester v. B. & M. Min. Co., 21 Mont. 544, 556, 55 Pac. 229, 234 20

Georgia R. & Elec. Co. v. Decatur, 295 U. S. 165, 171, 79 L. Ed. 1365, 1369 ..... 6, 8, 23, 24

Gulf Refining Co. v. United States, 269 U. S. 125, 135, 70 L. Ed. 195, 198 23

Hammond v. Schappi Bus Line, 275 U. S. 164, 172, 72 L. Ed. 218, 221 22

Harris v. Friend, 24 N. M. 627, 175 Pac. 722, 725 15

Holland v. Dickerson, 41 Iowa 367, 373 15

Kellett v. Kellett, 3 Dow. App. Cas. 248, 254 20

Meredith v. City of Winter Haven, 320 U. S. 228 (Adv. Op., p. 6) 6, 7, 14

McLure's Estate, In re, 63 Mont. 536, 541, 208 Pac. 900, 902 ..... 3, 5, 13, 19, 24

Murphy's Estate, In re, 157 Cal. 63, 106 Pac. 230, 234 18

Richardson v. Woodward, (C. C. A. 4), 104 Fed. 873, 874 15

Samuell v. Moore Merc. Co., et al., 62 Mont. 232, 237, 204 Pac. 376, 377 22

Saunders v. Shaw, 244 U. S. 317, 319, 61 L. Ed. 1163, 1165 ..... 6, 8, 23, 24

Pages

State v. State Highway Commission, 82 Mont. 63, 71, 265 Pac. 1, 4 14
State ex rel LaPoint v. District Court, 69 Mont. 29, 34, 220 Pac. 88, 89 20
Sutherland, et al. v. Selling, et al., (C. C. A. 9), 16 Fed. (2d) 865, 868 7
Upham's Estate, In re, 127 Cal. 90, 97, 59 Pac. 315, 318 16
Wilkins v. Allen, 18 How. 385, 15 L. Ed. 396, 398 19
Wyman v. Wyman, (C. C. A. 9), 109 Fed. (2d) 473, 474 22
Yergy's Estate, In re, 106 Mont. 505, 511, 79 Pac. (2d) 555, 558 14

CODES AND STATUTES

Section 7021 of the Revised Codes of Montana, 1935 ..... 3, 5, 12, 13, 14, 15, 16, 17, 18, 23
Sec. 240 of Judicial Code, as amended by the Act of February 13, 1925 (Title 28, Sec. 347, U. S. C. A.) 6

MISCELLANEOUS

California Law Review, Vol. 10, p. 187 16
Federal Rules of Civil Procedure 7(a) and 8(d) 5, 7, 22
Fifth Amendment to the Constitution of the United States 7, 13, 21, 23, 24, 25
Paragraph 5(b) of Rule 38 of U. S. Supreme Court 6, 8, 24, 25
Webster's Dictionary 15

In the Supreme Court of the United States

October Term, 1944.

No.....

ELLA HAUSER THATCHER,
Petitioner,

vs.

KATHERINE REBECCA BLACKER and TAYLOR B. WEIR, Executor of the Last Will and Testament of Samuel T. Hauser, deceased,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Ella Hauser Thatcher, plainiff and appellee below, respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner contends that the decision of the Circuit Court of Appeals involves an important question of Montana law, and is in conflict with the law of that state; that it is also in conflict with applicable decisions of this Court, and that the mandate deprives her of the right to trial, guaranteed by the

Fifth Amendment to the Constitution of the United States. No question of fact is involved.

Samuel T. Hauser, a resident of Lewis and Clark County, Montana, died on November 9, 1941, leaving a holographic will made in January of that year. He left surviving him a sister, your petitioner, two nephews and four nieces. On June 27, 1942, the will was admitted to probate in the District Court of Lewis and Clark County, Montana, and Appellant Weir was appointed Executor thereof (R. 2 & 3).

In addition to the foregoing facts, petitioner's complaint (R. 2-7) alleges diversity of citizenship, the jurisdictional amount, and that decedent died intestate as to all of his property, except that named in the first sentence of paragraph entitled "Second" of the will, which reads as follows:

> "Second. I give to Katherine Rebecca Blacker all household furniture, table ware pictures, silverware, & jewelery. All the rest, residue and remainder of my estate, real personal and mixed and where soevr situated." (R. 7).

That is the only language in the will which refers to the disposition of any property, and the prayer of the complaint (R. 5 & 6) is for judgment that decedent died intestate as to all of his property, except that mentioned in the first sentence.

Respondents' answer denies that the testator died intestate as to any of his property (R. 12); admits all of the other material allegations of the complaint (R. 9), and affirmatively alleges certain circumstances surrounding testator's life (R. 9-12), which

are summarized in the opinion of the Circuit Court of Appeals (R. 60 & 61).

By motion for judgment on the pleadings (R. 12 & 13), petitioner contended in the District Court and in the Circuit Court of Appeals that matters affirmatively alleged in the answer are immaterial and may not be resorted to in construing a will such as is involved in this case and that evidence thereof is inadmissable. She also contended that, under the law of Montana:

1. Section 7021 of the Revised Codes of Montana of 1935, which reads as follows:

> "A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will.",

prohibits enlarging the bequest "I give to Katherine Rebecca Blacker all household furniture, table ware pictures, silverware, & jewelery." to include any other property.

2. That, since the phrase, "All the rest, residue and remainder of my estate, real personal and mixed and where soevr situated." contains no verb or operative word, "the rest and residue" of testator's estate is undisposed of.

3. That heirs at law cannot be disinherited by conjecture or by language which is not clear and unequivocal. In re McLure's Estate, 63 Mont. 536, 541, 208 Pac. 900, 902.

The motion for judgment on the pleadings was submitted upon oral argument and briefs (R. 21) and, on December 31, 1943, the District Court decided that Mr. Hauser died intestate as to all of his property except: "household furniture, table ware pictures, silverware, & jewelery." (Opn. R. 14-42), and, on January 17, 1944, entered judgment in favor of petitioner and against the respondents (R. 44).

Upon appeal by respondents, the Circuit Court of Appeals decided that the will gives decedent's entire estate to Respondent Blacker (R. 70) and, on October 18, 1944, rendered its opinion (R. 59-70), and entered a decree reversing the judgment of the District Court and remanding the case to that Court "to make findings and to enter judgment in harmony with the opinion of this court." (R. 71).

The opinion of the Circuit Court of Appeals discloses that that Court treated the matters affirmatively alleged in the answer as material and took them into consideration in construing the will (R. 60 & 70) and that it apparently gave no consideration to the other contentions of petitioner, hereinbefore set forth. They are not even referred to.

By Petition for Rehearing (R. 72) the attention of the Circuit Court of Appeals was called to the fact that it had overlooked petitioner's contentions and that, since it had decided that the matters affirmatively alleged in the answer are material, the case should be remanded to the District Court for trial of those issues, which, by Federal Rules of

Civil Procedure 7(a) and 8(d), are deemed denied. Petition for Rehearing was denied on December 2, 1944 (R. 74).

Respondent filed a motion to dismiss (R. 9) upon the ground that exclusive jurisdiction of the matter involved rests in the state court and that the complaint is insufficient, but those questions are not involved here, for the motion was denied by the District Court (R. 21-32 & 44) and that ruling sustained by the Circuit Court of Appeals (R. 61-66).

QUESTIONS PRESENTED.

I.

CONFLICT WITH THE LAW OF MONTANA.

Whether the decision of the Circuit Court of Appeals is in conflict with Section 7021 of the Revised Codes of Montana of 1935, which reads as follows:

> "A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will."

and with the rule announced by the Supreme Court of Montana in In re McLure's Estate, 63 Mont. 536, 541, 208 Pac. 900, 902, wherein the court, referring to the construction of a will which would result in disinheriting heirs, said:

> "Appellant's construction would take from the widow, the natural object of the testator's bounty, that which without a will the law

would have given her. Such a construction is not to be favored unless the 'intention' of the testator is so expressed in clear and unequivocal language."

II.

VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND CONFLICT WITH DECISIONS OF THIS COURT.

Whether failure of the Circuit Court of Appeals to remand the case to the District Court for trial after it had decided that the affirmative allegations in the answer, which petitioner, by motion for judgment on the pleadings, claimed to be immaterial, are material, constitutes a violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and is in conflict with applicable decisions of this Court. Saunders v. Shaw, 244 U. S. 317, 319 and Georgia R. & Elec. Co. v. Decatur, 295 U. S. 165, 171.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Sec. 240 of the Judicial Code, as amended by the Act of February 13, 1925 (Title 28, Sec. 347, U. S. C. A.), and also relies on Paragraph 5(b) of Rule 38 of this Court, and upon Erie R. Co. v. Tompkins, 304 U. S. 64; Meredith v. City of Winter Haven, 320 U. S. 228 (Adv. Op., p. 6); Saunders v. Shaw, 244 U. S. 317, 319 and Georgia R. & Elec. Co. v. Decatur, 295 U. S. 165, 171.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

The Circuit Court of Appeals failed to follow the rule announced in Erie R. Co. v. Tompkins, 304 U. S. 64, and Meredith v. City of Winter Haven, 320 U. S. 228, (Adv. Op., p. 6).

II.

The questions as to the construction of the will here presented involving, as they do, property rights, are "important questions of local law" clearly within the meaning of Paragraph 5(b) of Rule 38 of this Court. As pointed out in Sutherland, et al. v. Selling, et al., (C. C. A. 9), 16 Fed. (2d) 865, 868:

> "It would be unfortunate indeed if the law were otherwise, because in that event there might be one rule of property for citizens of the state and a different rule for citizens of other states and aliens."

Also, if the decision of the Circuit Court of Appeals is allowed to stand, it will result in a high degree of confusion similar to that referred to by this Court in Barber v. Pittsburg Ft. W. & C. R. Co., 166 U. S. 83, 109.

III.

In failing to remand the case for trial of the issues of fact raised by the affirmative allegations of the answer, the Circuit Court of Appeals has deprived the petitioner of her right to trial of those issues, which is guaranteed by the due process clause of the Fifth Amendment to the Constitution of the

United States. In this respect the decision is in conflict with the decisions of this Court in Saunders v. Shaw, 244 U. S. 317, 319 and Georgia R. & Elec. Co. v. Decatur, 295 U. S. 165, 171.

If the decision is allowed to stand, it will tend to increase the trial of cases in the Federal Courts in Montana, upon allegations of fact when they should be disposed of upon questions of law. A plaintiff, who, in the honest belief that a case may be disposed of by motion for judgment on the pleadings, and the expense and burden of the trial to the parties and the Court thus avoided, will be faced with the hazard of being denied his right to trial if the motion is denied.

By its mandate the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision. (Par. 5(b) of Rule 38 of this Court).

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals in the case numbered and entitled on its docket, No. 10707, Katherine Rebecca Blacker and Taylor B. Weir, Executor of the Last Will and Testament of Samuel T. Hauser, Deceased, Appellants, vs. Ella Hauser Thatcher, Appellee, to the end that this cause may be reviewed

and determined by this Court as provided by the statutes of the United States; that the judgment of said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as may be proper.

Dated, Helena, Montana, January 13, 1945.

LESTER H. LOBLE,
M. S. GUNN,
of Helena, Montana,
Attorneys for Petitioner.

C. T. BUSHA, JR.,
Great Falls, Montana,
MILTON C. GUNN,
GUNN, RASCH & GUNN,
Helena, Montana,
Of Counsel for Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that I am one of the petitioner's attorneys in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in law and fact, and that said petition is not interposed for delay.

Dated, Helena, Montana, January 13, 1945.

M. S. GUNN,
Attorney for Petitioner,
Ella Hauser Thatcher.

The Honorable A. H. Angstman, one of Petitioner's attorneys below, having been elected to the Supreme Court of Montana, and having, since the denial of the Petition for Rehearing, assumed his seat as an Associate Justice on that Court, takes no part in this petition.

In the Supreme Court of the United States

October Term, 1944.

No.....

ELLA HAUSER THATCHER,
Petitioner,

vs.

KATHERINE REBECCA BLACKER and TAYLOR B. WEIR, Executor of the Last Will and Testament of Samuel T. Hauser, deceased,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURT BELOW.

An opinion by the District Court, written by District Judge James H. Baldwin (since deceased) was filed December 31, 1943. It appears at pages 14 to 42 of the Record, and has not been officially reported. An opinion by the Circuit Court of Appeals was filed October 18, 1944, and appears at pages 59 to 70 of the Record. It is reported in 145 Fed. (24) 255 (Adv. Op.)

II.

JURISDICTION.

Petitioner adopts the jurisdictional statement and petition in the Petition for Writ of Certiorari (p. 6 hereof) as supporting the jurisdiction of this Court.

III.
STATEMENT OF THE CASE.

Petitioner adopts the "SUMMARY STATEMENT OF THE MATTER INVOLVED", appearing in the Petition for Writ of Certiorari (pp. 1-5 hereof), as a statement of the case for the purpose of this brief.

IV.
SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals erred:

1. In deciding that the will gives all of the property to Respondent Blacker and reversing the decision of the District Court, the Court failed to follow the law of Montana as declared by Section 7021 of the Revised Codes of Montana of 1935 and announced by the Supreme Court of that State.

2. In treating the matters affirmatively alleged in the answer as material and failing to remand the case to the District Court for trial of the issues presented by those allegations.

SUMMARY OF THE ARGUMENT

Argument herein follows in sequence the "SPECIFICATIONS OF ERROR", set forth above, and the "QUESTIONS PRESENTED" (pp. 5-6 hereof).

Part I is devoted, first, to the conflict between the decision of the Circuit Court of Appeals and Section 7021 R. C. M. 1935, and, second, to the conflict between the decision of the Circuit Court of Appeals and the decision of the Supreme Court of Montana

in In re McLure's Estate, 63 Mont. 536, 541, 208 Pac. 900, 902.

Part II is devoted to the question as to whether the decision of the Circuit Court of Appeals is in conflict with applicable decisions of this Court, and the question as to whether petitioner has been denied the right to trial as guaranteed by the Fifth Amendment to the Constitution of the United States.

ARGUMENT

I.

THE CONFLICT WITH THE LAW OF MONTANA. (Question I and Spec. of Err. 1.)

A.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH SECTION 7021 MONTANA REVISED CODES, 1935.

The construction of the will in this case involves the single question as to what, if any, property is left undisposed of by the will. The only language in the will which relates to the disposition of any property is contained in the paragraph entitled "Second", of the will, which reads as follows:

> "Second. I give to Katherine Rebecca Blacker all household furniture, table ware pictures, silverware, & jewelery. All the rest, residue and remainder of my estate, real personal and mixed and where soevr situated." (R. 7)

The first sentence is a "clear and distinct bequest." That paragraph must be construed "in strict con-

formity with the pertinent sections of our statutes". In re Yergy's Estate, 106 Mont. 505, 511, 79 Pac. (2d) 555, 558. Section 7021 R. C. M. 1935 which is the only Montana statute dealing specifically with a "clear and distinct bequest" reads as follows:

> *"A clear and distinct devise or bequest cannot be affected* by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will." (Italics ours).

Although cited and relied upon by petitioner (R. 72), it is not referred to in the opinion of the Circuit Court of Appeals and the Court failed to apply it in construing the will.

Section 7021 has never been construed or applied by the Supreme Court of Montana, but that fact did not relieve the Circuit Court of Appeals from applying it in this case. Meredith v. City of Winter Haven, 320 U. S. 228 (Adv. Op., p. 6). However, there is no need for construction of that statute for, as said in State v. State Highway Commission, 82 Mont. 63, 71, 265 Pac. 1, 4,:

> "'whenever the language of a statute is plain, simple, direct and unambiguous, it does not require construction, but it construes itself.' * * * 'It is not allowable to interpret what has no need of interpretation, or, when the words have a definite and precise meaning to go elsewhere in search of conjecture in order to restrict or extend their meaning'."

The import of Section 7021 is contained in the words "cannot be affected". "Affected" is defined

by Webster to mean "influenced", and by the courts as follows:

In Richardson v. Woodward, (C. C. A. 4), 104 Fed. 873, 874, the court said:

> "'shall not affect' means shall not *enlarge* or *diminish*." (Italics ours).

In Holland v. Dickerson, 41 Iowa 367, 373, the court said:

> "To affect does not mean to impair, but to work a change upon. A right is affected, if it is either *enlarged* or *abridged*." (Italics ours). (Quoted and adopted in Harris v. Friend, 24 N. M. 627, 175 Pac. 722, 725).

The bequest,

> "I give to Katherine Rebecca Blacker all household furniture, table ware pictures, silverware, & jewelery."

is clear and distinct within the meaning of Section 7021 and, by enlarging that bequest to include all of the testator's property, the Court has done just what Section 7021 forbids, to-wit:

1. It has allowed the phrase,

> "All the rest, residue and remainder of my estate, real personal and mixed and where soevr situated.",

which contains no verb or operative word to "affect" the "clear and distinct bequest" contained in the preceding sentence. In using that phrase and in setting it off by itself, beginning with a capital letter and ending with a period, it is clear that the testator recognized that the bequest to Miss Blacker was limited to the property described in the preced-

ing sentence and that a "residue" remained, which he intended to, but did not, dispose of.

Referring to a situation similar to the one under consideration, the Supreme Court of California in In re Upham's Estate, 127 Cal. 90, 97, 59 Pac. 315, 318, said:

> "* * * how can a subsequent clause, which expressly refers to and *recognizes* as existing a previous clause, be held to revoke or destroy the latter, *where there are no operative words to that effect,* or which express any such intent? Moreover, it is a rule of construction of wills —declared by our Code (section 1322, Civ. Code)—that 'a clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will';" (Italics ours). See note below.

2. The Court has also allowed "argument from other parts of the will" to "affect" the "clear and distinct bequest." In its opinion it says that, because Respondent Blacker is the only person named in the will, it seems "reasonably certain" that testator intended that she should take all of his property. (R. 69).

Section 7021 R. C. M. 1935 is identical with Section 1322 of the California Civil Code, and both were taken from Section 584 of Field's Civil Code. That Code was never adopted in New York but has, with minor changes, been adopted in five western states, including Montana and California. California Law Review, Vol. 10, p. 187.

If the testator had intended that Respondent Blacker should have all of his property, he could and undoubtedly would have expressed that intention by the three words "all my property".

3. The Court has also resorted to "inference". It infers that the testator specifically enumerated the household and personal effects because he may have thought that those items would be "claimable as, of course, by immediate relatives". (R. 70).

4. The Court has also allowed "other reasons" to "affect" the bequest to Respondent Blacker, to-wit: The matters affirmatively alleged in the answer (R. 9-12). In its opinion it says: "The situation of the testator and the circumstances of his life when the will was drawn are entirely consistent with this construction." (R. 70).

Resort to such extrinsic matters is within the express prohibition of Section 7021, that a "clear and distinct devise or bequest cannot be affected by any reasons assigned therefor.".

From the opinion it appears that the Court's error in this respect was due to the fact that it based its decision upon an intention which it thought existed in the mind of the testator at the time he made his will, rather than upon the intention of the testator as expressed by the language used in the will. In its opinion it says:

> "While fixed rules for the interpretation of writings afford helpful guides, they yield in cases of the construction of wills to the basic principle that the thing to be sought for and

> found, if possible, is the intention of the testator." (R. 69),

and cites Colton v. Colton, 127 U. S. 300, 310, wherein this Court stated the correct rule as follows:

> "The object, therefore, of a judicial interpretation of a will is to ascertain the intention of the testator, according to the meaning *of the words he has used.*" (Italics ours).

As said by this Court in Barber v. Pittsburg Ft. W. & C. R. Co., 166 U. S. 83, 109,:

> "'A court may look beyond the face of the will where there is an ambiguity as to the person or property to which it is applicable, *but no case can be found where such testimony has been introduced to enlarge or diminish the estate devised.*' King v. Ackerman, 67 U. S. 2 Black, 408, 418." (Italics ours).

Section 7021 is a statutory declaration of the intention of a testator where the will contains a "clear and distinct bequest" and must be given effect regardless of the rule against intestacy referred to by the Circuit Court of Appeals (R. 68). This rule is stated in In re Murphy's Estate, 157 Cal. 63, 106 Pac. 230, 234, as follows:

> "* * * a canon of interpretation applicable to prevent intestacy cannot be invoked to set aside plain rules of law declaring the legal meaning and effect to be given to language used in such a devise as is here under consideration."

B.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THE SUPREME COURT OF MONTANA IN IN RE McLURE'S ESTATE, 63 MONT. 536, 541, WHICH IS TO THE EFFECT THAT HEIRS AT LAW MAY NOT BE DISINHERITED EXCEPT WHERE SUCH INTENT IS EXPRESSED IN LANGUAGE WHICH IS CLEAR AND UNEQUIVOCAL.

In In re McLure's Estate, 63 Mont. 536, 541, 208 Pac. 900, 902, the Supreme Court of Montana said:

> "Appellant's construction would take from the widow, the natural object of the testator's bounty, that which without a will the law would have given to her. Such a construction is not to be favored unless the 'intention' of the testator is so expressed in clear and unequivocal language."

The rule of interpretation referred to is particularly well stated in Wilkins v. Allen, 18 How. 385, 15 L. Ed. 396, 398, as follows:

> "In speaking of expressions in a will necessary to disinherit the heir, Chief Justice Gibson, in delivering the opinion of the court in the case of Bradford v. Bradford, 6 Whart., 244 says: 'The intention must be manifest, and rest on something more certain than conjecture. The court must proceed on known principles, and established rules, not on loose conjectural interpretations, nor considering what a man may be imagined to do in the testator's circumstances. The principle is applicable in all its force in a case like the present, in which the question goes to the birthright of those who,

> standing in place of the common law heir, are not to be disinherited except by express devise, or as is said in 1 Powell on Devises, 199, by implication so inevitable that an intention to the contrary cannot be supposed.' "

This rule was a part of the common law, Kellett v. Kellett, 3 Dow. App. Cas., 248, and, although not embraced in the Montana Code, it is the law of Montana. In speaking of a rule which is not embraced within the Montana Code, the Supreme Court of Montana, in Aetna Accident & Liability Co. v. Miller, 54 Mont. 377, 382, 170 Pac. 760, said: "the question is one to be resolved according to the common law" and, in State ex rel LaPoint v. District Court, 69 Mont. 29, 34, 220 Pac. 88, 89: "Our Code further recognizes the continuance of the common law and that the codification does not embrace the whole body of the law". See also, Forrester v. B. & M. Min. Co., 21 Mont. 544, 556, 55 Pac. 229, 234.

The fact that the Circuit Court of Appeals found it necessary to resort to inference, argument from other parts of the will, and the extrinsic circumstances alleged in the answer, to support its conclusion that the will gives all of Mr. Hauser's property to Respondent Blacker, is a recognition of the fact that the intention of the testator to disinherit his heirs is "not expressed in clear and unequivocal language".

Among the matters affirmatively alleged in the answer as one of the circumstances indicating that Mr. Hauser intended Respondent Blacker to have all of his property is that concerning the alleged

estranged relations between Mr. Hauser and his sister, your petitioner (R. 11). As petitioner is but one of seven heirs, Mr. Hauser's relations with her cannot shed any light upon the question as to whether he intended to disinherit all of his heirs. This indicates one of the reasons for the rule that heirs at law should not be disinherited except by language which is "clear and unequivocal".

II.

IS THE FAILURE OF THE CIRCUIT COURT OF APPEALS TO REMAND THE CASE TO THE DISTRICT COURT FOR TRIAL, AFTER IT HAS DECIDED THAT THE MATTERS AFFIRMATIVELY ALLEGED IN THE ANSWER ARE MATERIAL, A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND IN CONFLICT WITH DECISIONS OF THIS COURT?

(Question II & Spec. of Err. 2).

As stated by the Circuit Court of Appeals in its opinion:

> "The answer contains affirmative matter bearing on the circumstances of the testator's life. It is alleged that at the time of the making of his will his wife was dead; that appellant Blacker had from childhood been a close companion and associate of Hauser and his wife; that she had been engaged to marry Hauser for some months prior to his decease; and that for many years Hauser had been estranged from the complainant, his sister." (R. 60)

Petitioner challenged the materiality of those allegations by motion for judgment on the pleadings, which is, in effect, a demurrer. Samuell v. Moore Merc. Co., et al., 62 Mont. 232, 237, 204 Pac. 376, 377; David v. Robert Dollar Co., (C. C. A. 9), 2 Fed. (2d) 803, 806.

The Circuit Court of Appeals decided that the matters affirmatively alleged are material and resorted to them in its construction of the will. In its opinion it said:

> "The situation of the testator and the circumstances of his life when the will was drawn are entirely consistent with this construction." (R. 70)

In doing this and reversing the judgment of the District Court, the Circuit Court of Appeals has created a situation which is the same as though the motion had been denied by the District Court and, by virtue of Federal Rules of Civil Procedure 7(a) and 8(d), the affirmative allegations of the answer stand denied. Therefore, the petitioner is entitled to a trial of the issues of fact raised by those allegations. Hammond v. Schappi Bus Line, 275 U. S. 164, 172; Wyman v. Wyman, (C. C. A. 9) 109 Fed. (2d) 473, 474.

The decree of the Circuit Court of Appeals, reversing the judgment of the District Court with directions "to make findings and to enter judgment in harmony with the opinion of this court" (R. 71), makes the opinion (R. 59-70) a part of the mandate, and the District Court cannot do otherwise than

enter judgment giving all of the property to Respondent Blacker. Gulf Refining Co. v. United States, 269 U. S. 125, 135.

The result of the decision of the Circuit Court of Appeals is to deprive petitioner of the right to trial of the issues raised by the answer, in violation of the due process clause of the Fifth Amendment to the Constitution of the United States. In this respect, the decision is in conflict with the decisions of this Court in Saunders v. Shaw, 244 U. S. 317, 319 and Georgia R. & Elec. Co. v. Decatur, 295 U. S. 165, 171.

As we have pointed out, petitioner contended in the courts below and here contends that the circumstances affirmatively alleged in the answer are immaterial. However, if, as decided by the Circuit Court of Appeals, they are material, petitioner is entitled to her "day in court" and the opportunity to introduce evidence in denial and rebuttal of those allegations.

Petitioner believes that she will be able to show that she was not estranged from her brother, the testator, at the time of his death, that the testator was not engaged to Respondent Blacker, and other circumstances wholly inconsistent with any intention to disinherit either your petitioner or his other heirs. The Court may not assume that such a showing cannot be made. Saunders v. Shaw, 244 U. S. 317, 319.

CONCLUSION.

The decision of the Circuit Court of Appeals is in conflict with Section 7021 Revised Codes of Mon-

tana of 1935, the decision in In re McLure's Estate, 63 Mont. 536, 541, 208 Pac. 900, 902, the due process clause of the Fifth Amendment to the Constitution of the United States, and the decisions of this Court in Saunders v. Shaw, 244 U. S. 317, 319, and Georgia R. & Elec. Co. v. Decatur, 296 U. S. 165, 171.

That these conflicts involve such important questions as are contemplated by Paragraph 5(b) of Rule 38 of this Court is clearly established by the fact that if the decision of the Circuit Court of Appeals is allowed to stand:

It will result in confusion and uncertainty as to the property rights of the heirs of a resident of Montana, for there will be one rule of property for citizens of Montana and a different rule for non-residents who may resort to the Federal Courts.

It will stand as an invitation to non-residents of Montana to resort to the Federal Courts in that state in the hope of enlarging or diminishing clear and distinct bequests and devises contained in the wills of deceased residents of Montana.

It will tend to increase the trial of cases upon allegations of fact when they should be decided and disposed of upon questions of law. A litigant will hesitate to submit a case upon a question of law by motion for judgment on the pleadings or to dismiss when, if the motion is denied, he will be deprived of the right to trial of allegations of fact which the Court has decided are material.

It will deprive petitioner of her right to a trial of the issues raised by the affirmative allegations of

the answer, in violation of the Fifth Amendment to the Constitution of the United States.

Furthermore, the mandate constitutes such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this court's supervision (Paragraph 5(b) of Rule 38 of this Court).

Respectfully submitted,

LESTER H. LOBLE,
M. S. GUNN,
of Helena, Montana,
Attorneys for Petitioner.

C. T. BUSHA, JR.,
Great Falls, Montana
MILTON C. GUNN,
GUNN, RASCH & GUNN,
Helena, Montana,
Of Counsel for Petitioner.

No. 851

In the Supreme Court of the United States

October Term, 1944

ELLA HAUSER THATCHER,
Petitioner,

vs.

KATHERINE REBECCA BLACKER and TAYLOR B. WEIR, Executor of the Last Will and Testament of Samuel T. Hauser, deceased,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Taylor B. Weir,
Counsel for Respondents
(*Address: Helena, Montana*)

Filed ....., 1945.

....., Clerk.

MONTANA RECORD PUBLISHING CO.
HELENA, MONTANA

SUBJECT INDEX

	Pages
SUMMARY OF POINTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI	1
SUPPLEMENTAL STATEMENT	4
LACK OF CONFLICT BETWEEN DECISION OF CIRCUIT COURT OF APPEALS AND EITHER THE GENERAL OR LOCAL LAW OF MONTANA	6
Montana Code Section 7021 misconstrued by petitioner	6
Decision not in conflict with McLure case	8
CIRCUIT COURT DECISION IS BASED UPON RESPONDENT'S MOTION TO DISMISS THE COMPLAINT, AND NOT UPON THE ANSWER, THEREFORE NO ESSENTIAL FACT ISSUE TO BE TRIED	11

TABLE OF AUTHORITIES CITED

Erie R. Co. v. Tomkins, 304 U. S. 64, 82 L. ed. 1188	5
McLure's Estate, 63 Mont. 536, 208 Pac. 900	2-6-8
Saunders v. Shaw, 244 U. S. 317, 61 L. ed. 1163	3

CODES AND STATUTES

Section 7016 Revised Codes of Mont. of 1935	8
Section 7016 to 7054 Revised Codes of Mont. of 1935	8
Section 7020 Revised Codes of Mont. of 1935	8
Section 7021 Revised Codes of Mont. of 1935	8
Section 7024 Revised Codes of Mont. of 1935	8
Section 7025 Revised Codes of Mont. of 1935	8
Section 10328 Revised Codes of Mont. of 1935	4

MISCELLANEOUS

Art. VIII, Sec. 11, Montana Constitution	4

In the Supreme Court of the United States

October Term, 1944

No. 851

ELLA HAUSER THATCHER,

Petitioner,

vs.

KATHERINE REBECCA BLACKER and TAYLOR B. WEIR, Executor of the Last Will and Testament of Samuel T. Hauser, deceased,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The respondents, Katherine Rebecca Blacker and Taylor B. Weir, Executor of the last will and testament of Samuel T. Hauser, deceased, in opposition to the petition for writ of certiorari herein respectfully suggest to the Court:

SUMMARY OF POINTS IN OPPOSITION PETITION:

I.

Petitioner, in her assignment numbered I, has misconstrued the Montana Code, Section 7021 (Petition p. 5), which she asserts is contrary to the decision of the Circuit Court of Appeals. The Petitioner so construes that section as though a devise or bequest

would be "affected", contrary to the terms of the section, by the mere inclusion of more than one item in the devise or bequest or by the making of several gifts to the same person, whereas the prohibition of the section is merely against so construing other words of the will of not clear meaning as to whittle down or increase the estate of the donee of the prior "clear and distinct devise or bequest", or to whittle down or increase the number, area or value of the thing given.

In other words, the petitioner is here contending that by including the "residue" item of the clause second of the will in the gift to Blacker, the Circuit Court violated the Montana Code Section 7021, because, says petitioner, that added something to ("affected") the gift of "household furniture", etc. being an item before mentioned in the same clause second.

II.

Petitioner, by her assignment numbered II, contends the decision of the Circuit Court of Appeals runs counter to the law of Montana as laid down in McLure's Estate 64 Mont. 536, in that, so petitioner asserts, the Circuit Court has not given due weight to the rule laid down in that case, to the effect that a construction of the will against one who would be the natural object of the testator's bounty, should be avoided. The Montana court in the McLure case holds the first and paramount rule for construing the language of a will, to be "all the parts of a will are to be construed in relation to each other, so as, if

possible, to form one consistent whole *****" "In construing the provisions in favor of the widow, it is necessary to first arrive at the testator's intention, and that construction will be favored which will reconcile the several provisions with his intentions, for a will is to be construed according to the intention of the testator". (64 Mont. 541). The petition fails to point out wherein the decision of the Circuit Court fails to follow that rule.

III.

Petitioner specifies as her final assignment, numbered III, the failure of the Circuit Court of Appeals to remand the case to the District Court for trial of fact issues raised in the answer, as in Saunders v. Shaw, 244 US 317.

Petitioner erroneously assumes that the Circuit Court's decision is grounded on her motion for judgment on the pleadings.

The judgment of the District Court from which the appeal was taken was upon defendants' (respondents') motion to dismiss the complaint, as well as upon plaintiff's (petitioner's) motion for judgment on the pleadings.

The decision of the Circuit Court is upon defendants' (respondents') motion to dismiss the complaint, which did not in any way involve the answer.

Defendants in the trial court could not, nor could they as appellants in the Circuit Court, have judgment on plaintiff's motion whatever the grounds for that motion.

The Circuit Court in denying petitioner's petition for rehearing, raising the question of whether or not the affirmative matter set up in the answer had been considered by that Court as material to the construction of the will, has answered the question in the negative, therefore petitioner has not been denied due process.

SUPPLEMENTAL STATEMENT OF THE CASE.

Hauser's estate is being probated in the Montana State District Court, a court of general jurisdiction, (Montana Constitution Act VIII, Sec. 11.) and was so pending at the time petitioner Thatcher filed her complaint in the Federal District Court, seeking to have the latter court construe the will. (R. 3 parg. V)

The same questions of fact and law were before the State Court for decision as its final judgment in the probate. (Sec. 10328 Revised Codes of Montana 1935).

Respondents (defendants below) appeared in the Federal Court by filing their answer coupled with two motions, one objection to the jurisdiction and the other to dismiss the complaint for failure to state a claim against defendants upon which relief can be granted. (R. 9)

Petitioner (plaintiff below) then filed her motion for judgment on the pleadings (R. 12) and the three motions (defendants' and plaintiff's motions) were heard together and resulted in judgment denying defendants' (respondents') motions and granting plaintiff's (petitioner's) motion (R. 44). Appeal

from that judgment was had to the Circuit Court of Appeals, specifying as errors both the denial of the defendants' motion to dismiss the complaint and the entry of judgment on the plaintiff's motion for judgment on the pleading. (R. 52)

The Circuit Court reversed the lower court and ordered judgment for respondents (defendants) below. (R. 59)

Appellee (petitioner) filed her petition for rehearing, specifying the several points urged here, including the question of whether or not the affirmative matter of the answer is material to the construction of the will under the Circuit Court's decision (R. 72), and that petition for rehearing was denied by the Circuit Court. (R. 74)

To us petitioners stated reasons relied on in appealing to this Court for allowance of the writ of certiorari with the argument advanced in the brief that "It (the decision) will result in confusion and uncertainty as to property rights of the heirs of a resident of Montana, for there will be one rule of property for citizens of Montana and a different rule for non-residents who may resort to Federal Courts," (brief p. 24 L. 12) and then citing the Erie R. Co. case (304 US 64) as authority, in view of her resort to the Federal Court in order to anticipate the then pending decision of the State Court construction of this will, seem inconsistent and so contrary to justice as to warrant denial of the petition, without more, for the non-resident voluntarily goes into the Federal

Court anticipating a different result than would be reached in the State Court.

No violation of the Rule that the Statutes and Decisions of the State shall Control Federal Court Decisions in Matters of "General" law, as well as in Matters of "Local" law, announced in the Erie R.R. Case (304 US 64), can be spelled out of the Decision. (Assignments Nos. I & II of Reasons)

Petitioner, in her assignment of reasons Number I (Petition p. 7 brief pp 13-18) contends (1) that the decision is contrary to the Montana Code section 7021 set out at page 5 of the petition, and (2) contrary to the decision of the Montana Court in McLure's Estate, 62 Mont. 536, 208 Pac 900, and therefore, petitioner contends, the decision fails to follow the rule laid down in the Erie R.R. case to the effect that state statutes and decisions shall control Federal Court decisions in matters of "general" as well as "local" law.

MONTANA CODE SECTION 7021.

We think petitioner misconstrues the section 7021, and that it has no relation to the matters involved in the decision here.

The Montana Court has not construed the section 7021. We think the purpose of that section to be only that where the testator has made a devise or bequest in clear and distinct language, then the section *pro-*

tects the integrity of that grant against being whittled away by "any other words not equally clear."

For example, if the testator has made a grant of "Black Acre" in fee simple, that estate is not to be cut down to some lesser interest, and the designation "Black Acre" being "clear and distinct" as to its identity, the wood lot is not to be excluded from the grant, "by any other words not equally clear and distinct", or "by any reasons assigned (by the testator) therefor", or "by an inaccurate recital (by the testator) of or reference to its contents in another part of the will."

As we understand the petition, it is there contended that the section 7021 precludes the inclusion of the "residue item" in the Clause Second from the gift to Blacker, because petitioner says that would be adding something to the gift of "household furniture, etc." and would, (the petitioner contends) therefore "affect" the bequest of "household furniture, etc." in violation of the Section 7021.

The bequest of the item "household furniture" is no more "affected" by the inclusion of the additional item — the "residue" item — than it is by the inclusion of the item "silverware". Nothing is added to or taken from the "bequest of household furniture" by the testator giving to the same donee some other or different property.

Moreover, the description "all household furniture, table ware, pictures, silverware & jewelery", in the absence of the word "my" before the words "house-

hold furniture", is neither "clear" nor "distinct" in the meaning of the section 7021, until we identify "household furniture" by the later words "of my estate" contained in the language petitioner would have us reject.

Therefore the decision is not in conflict with the state section 7021.

DECISION NOT IN CONFLICT WITH McCLURE CASE.

The Montana codes (1935) contain 39 sections (7016 to 7054), setting out the commonly accepted rules for construction of wills, among which are,

"Section 7016, A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible."

"Section 7020. All the parts of a will are to be construed in relation to each other, so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail."

"Section 7024. The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative"; and

"Section 7025. Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy."

The Montana Court in the McLure case, wherein the question for decision was not as to who would

take under the will, but who, among a creditor, O'Connor and Gow, the nominee of both children and the widow, had the preference right to appointment as administrator c.t.a., announces an additional rule (additional to the 34 code sections), viz.

"Appellant's construction would take from the widow, the natural object of the testator's bounty, that which without a will the law would have given to her. Such a construction is not to be favored unless the 'intention' of the testator is so expressed in clear and unequivocal language." (63 Mont. p. 541).

In the McLure case the question of interpretation of the will was only incidental to the further question of whether or not the widow took any part of the personal estate, thereby qualifying her to nominate for the appointment of administrator, and the latter question was not necessary to the court's decision. Both the children (who were qualified to nominate) and the widow (whose right to nominate was in question) having nominated Gow, as against the creditor O'Connor, the State court says, as to Gow's appointment:

"it cannot be said whether the trial court in making the appointment of Gow heeded the request made by the three children or was guided by the nomination made by the widow. In either event the order would be sustained." (63 Mont. 544)

The will in the McLure case provided, first:

A small money bequest to one granddaughter, and to a second granddaughter such share of the estate

as her father *would have taken under* the *laws* of *succession* if he were living, then provides that "all of the remainder of my property shall be divided equally among my six children now living", and then after nominating an executor and immediately before the date line and signature is the provision: "My wife shall be endowed in my estate, real and personal, in Montana as under the law of Montana, real in any other state as under the law of such state". No other provision was made for the wife. (63 Mont. 540)

It was contended that by the use of the word "endowed", the widow took in the real property only, and not in the personal property and therefore, under the Montana statutes, had no right to nominate an administrator.

We, therefore, find the decision in the McLure case on the question of will construction, to be limtied to the holding that the word "endowed" used in the will was to be given its dictionary meaning, and the meaning as used in the marriage ceremony "with all my worldly goods I thee *endow*", rather than confine it to the meaning of the technical term as used in reference to interest in real property.

And in reaching that conclusion, the state court recognized the paramount rule:

"In construing the provision in favor of the widow, it is necessary to first arrive at the testator's intention, and that construction will be favored which will reconcile the several provisions with his intention, for a will is to be construed according to the intentions of

the testator. (Sec. 7016, Rev. Codes 1921)" 63 Mont. 536.

The petition here fails to point out wherein the decision here is in conflict with the body of rules of construction of wills for which the McLure case holds.

NO ISSUE OF ESSENTIAL FACT LEFT TO BE TRIED UNDER THE DECISION OF THE CIRCUIT COURT OF APPEALS

(Assignment No. III of Reasons)

There was no issue of essential fact left to be tried after the decision of the Circuit Court of Appeals.

The cause went to the Circuit Court of Appeals from the judgment of the District Court. The judgment of the District Court was given upon defendants' (respondent's) motion to dismiss the complaint upon the ground (among others) that the complaint fails to state a claim against defendants, or either thereof, upon which relief can be granted, (R. 9), and upon plaintiff's (Petitioner's) motion for judgment upon the pleadings (R. 12), and the two motions being heard together the judgment of the District Court is upon defendants' (respondents') motion to dismiss, as well as upon plaintiff's (petitioner's) motion for judgment on the pleadings (R. 44)

By this specification petitioner contends she has been deprived of due process, in that the Circuit Court of Appeals failed to remand the cause for trial of the issues of fact pleaded in the answer to the ef-

fect that Hauser had been estranged from his sister (petitioner) for many years and was engaged to be married to Blacker, etc. (respondent). (R. 9, 10, & 11).

The Circuit Court at the conclusion of its opinion, adverted to these matters as follows:

> "We conclude that the will gives the entire estate of the decedent to appellant Blacker.
>
> "The situation of the testator and the circumstances of his life when the will was drawn are entirely consistent with this construction. ***** Those circumstances, as detailed in appellants' answer, are admitted to be true by the motion for judgment on the pleadings." (R. 70)

By its decision, the Circuit Court has decided this case upon appellants' (respondents') motion to dismiss the complaint for failure to state a claim upon which relief may be granted, presented to the trial court and decided by the trial court against these respondents, (R. 44) and from which judgment the appeal to the Circuit Court of Appeals was prosecuted, specifying this action of the trial court as error. (R. 52 specification 2).

For the purpose of that motion to dismiss, the complaint alone was in question and the allegations of the answer could not have been considered by the Court, and, therefore, could not have been the basis for or material to the decision.

As the matter stood before the Circuit Court of

Appeals, the motion to dismiss the complaint must necessarily have been the basis for decision construing the will in favor of appellants (respondents), for appellants had made no motion for judgment on the pleadings.

Moreover, as the record now stands, the Circuit Court of Appeals, in denying petitioner's (appellee in Circuit Court) motion for rehearing, has held that the fact allegations of the answer upon which petition here claims right of trial were not essential or material to its decision construing the will.

Petitioner's (appellee below) by specification IV (R. 72) of her petition for rehearing before the Circuit Court, presented this very question to that Court in the following language:

"IV"

"If this Court finally decides that the affirmative matters alleged in the answer are material to the construction of the will, the case must be remanded to the District Court for trial of the issues of fact raised by the answer."

By it's denial of that petition, the Circuit Court necessarily held the affirmative matters alleged in the answer are not material to its decision construing the will — that such facts are not essential to its decision.

Therefore, petitioner is before this Court asking this Court to find as a matter of law that the affirmative matters set up in the answer are essential to a construction of Hauser's will, and that upon such

finding she has been deprived of right to trial of those matters in violation of the Federal Constitution.

We respectfully submit the petition should be denied.

TAYLOR B. WEIR
Counsel for Respondents
(Helena, Montana)

No. 851

In the Supreme Court of the United States

October Term, 1944.

ELLA HAUSER THATCHER,
Petitioner,

vs.

KATHERINE REBECCA BLACKER and TAYLOR B. WEIR, Executor of the Last Will and Testament of Samuel T. Hauser, deceased,
Respondents.

PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' BRIEF

LESTER H. LOBLE,
M. S. GUNN,
of Helena, Montana,
Attorneys for Petitioner.

C. T. BUSHA, JR.,
Great Falls, Montana,
MILTON C. GUNN,
GUNN, RASCH & GUNN,
Helena, Montana,
Of Counsel for Petitioner.

Filed February....., 1945.

....., Clerk.

SUBJECT INDEX

	Pages
ARGUMENT	1
I. REPLY TO RESPONDENTS' "SUPPLEMENTAL STATEMENT OF THE CASE" (Respondents' Brief, pp. 4-6)	1
II. REPLY TO RESPONDENTS' CONTENTION THAT THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH SECTION 7021 R. C. M. 1935. (Respondents' Brief, pp. 6-8)	4
III. REPLY TO RESPONDENTS' CONTENTION THAT THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISION IN IN RE McLURE'S ESTATE, 63 MONT. 536, 541. (Respondents' Brief, pp. 8-11)	5
IV. REPLY TO RESPONDENTS' CONTENTION THAT THERE IS "NO ISSUE OF ESSENTIAL FACT LEFT TO BE TRIED UNDER THE DECISION OF THE CIRCUIT COURT OF APPEALS". (Respondents' Brief, pp. 11-14)	7

TABLE OF AUTHORITIES CITED

CASES

	Pages
Central Vermont Trans. Co. v. Durning, (C. C. A. 2), 71 Fed. (2d) 273, 274	8, 9
Chadwick v. Chadwick, 6 Mont. 566, 577, 13 Pac. 385, 386	2
Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188	3
Davidson v. Wampler, 29 Mont. 61, 67, 74 Pac. 82, 84	2
Kline v. Burke Construction Co., 360 U. S. 226	3
McLure's Estate, In re, 63 Mont. 536, 541, 208 Pac. 900, 902	5
McClellan v. Carland, 217 U. S. 274, 282, 54 L. Ed. 762, 767	2
Meredith v. City of Winter Haven, 320 U. S. 228 (Adv. Op., p. 6)	4
Montana Horse Products Co. v. Great Northern Ry. Co., 91 Mont. 194, 210, 7 Pac. (2d) 919, 925	6
Payne v. Hook, 7 Wall, 425, 19 L. Ed. 260	3
State ex rel LaPoint v. District Court, 69 Mont. 29, 34, 220 Pac. 88, 89	6
Union P. R. Co. v. Mason City & Ft. D. R. Co., 199 U. S. 160, 166, 50 L. Ed. 134, 137	6

CODES AND STATUTES

Sections 7016 to 7054 Revised Codes of Montana, 1935	5
Section 7021, Revised Codes of Montana, 1935	4, 5
Section 10068, Revised Codes of Montana, 1921	6
Section 10328, Revised Codes of Montana, 1935	1, 2

MISCELLANEOUS

Section 11 of Article VIII of the Montana Constitution	1, 2
3 Bancroft's Probate Practice, p. 1892	3

In the Supreme Court of the United States

No. 851

October Term, 1944.

ELLA HAUSER THATCHER,

Petitioner,

vs.

KATHERINE REBECCA BLACKER and TAYLOR B. WEIR, Executor of the Last Will and Testament of Samuel T. Hauser, deceased,

Respondents.

PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' BRIEF

ARGUMENT

I.

REPLY TO RESPONDENTS' "SUPPLEMENTAL STATEMENT OF THE CASE".

(Respondents' Brief, pp. 4-6)

Relying upon Section 11 of Article VIII of the Montana Constitution and Section 10328 Revised Codes of Montana, 1935, respondents contend that the "same questions of fact and law" which are involved in this case are before the state court in the matter of the probate of the Hauser will and the administration of Mr. Hauser's estate. Any question involved in that contention is entirely immaterial in the matter before this Court for, as stated

in McClellan v. Carland, 217 U. S. 274, 282, when controversies between citizens of different states arise:

> "the Federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case."

However, in order to avoid any misunderstanding or confusion raised by such contention, we believe it well to point out that the questions of law and fact involved in this case are not pending in the state court.

Section 11 of Article VIII of the Montana Constitution provides that, as to all cases where the amount involved exceeds the sum of fifty dollars "the district courts shall have original jurisdiction," and Section 10328 provides how and to whom a distribution of the estate of a deceased person shall be made.

In Chadwick v. Chadwick, 6 Mont. 566, 577, 13 Pac. 385, 386, the court decided that a probate court did not have jurisdiction of a petition involving the construction of a will. It said "We think the construction of this will is within the peculiar province of a court of equity". That case was decided before Montana became a state, but, in 1903, fourteen years after the adoption of the State Constitution, in Davidson v. Wampler, 29 Mont. 61, 67, 74 Pac. 82, 84, the court, referring to the Chadwick and other later cases, and to the jurisdiction of district courts sitting in probate, said:

> "These latter cases also recognize the rule that when, under the Constitution, the jurisdic-

tion of these courts was transferred to the district courts, it was not enlarged, but it was the same as theretofore, though exercised by courts of general jurisdiction."

See also:

3 Bancroft's Probate Practice, p. 1892, where the Chadwick case is cited.

Respondents also contend that the petition for writ of certiorari should be peremptorily denied on the ground that it is contrary to justice for a non-resident to voluntarily go into the Federal Court "anticipating a different result than would be reached in the State Court" (Resps. Br. p. 5). Such a contention is groundless for, where diversity of citizenship exists, a litigant has the absolute right to go into the Federal Court. Payne v. Hook, 7 Wall. 425, & Kline v. Burke Construction Co., 260 U. S. 226.

Respondents have overlooked the fact that your petitioner went into the Federal Court relying on the rule announced in Erie R. Co. v. Tompkins, 304 U. S. 64. She assumed that, as a matter of right, the result would be the same as if she had gone into the state court. Her reason for presenting the Petition for Writ of Certiorari is that the result was not the same as it would have been in the state court.

Respondents' argument clearly illustrates that if the decision of the Circuit Court of Appeals in this case is allowed to stand, it will be an invitation to non-residents of Montana to resort to the Federal Courts in cases of this kind 'anticipating a different result than would be reached in the State

Court". This is the very basis of Reason II relied on by petitioner for allowance of the writ (Petition, p. 7).

II.

REPLY TO RESPONDENTS' CONTENTION THAT THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH SECTION 7021 R. C. M., 1935.

(Respondents' Brief, pp. 6-8).

Without citing any authority, respondents contend that Section 7021 only prohibits a "clear and distinct bequest" from being "whittled away" or "cut down" and that it does not prohibit the enlargement of such a bequest. We believe and respectfully submit that the authorities cited at pages 13 to 16 of petitioner's original brief conclusively establish the fact that the words "cannot be affected", as used in Section 7021, mean cannot be *enlarged* or diminished.

Respondents also say that Section 7021 has never been construed by the Montana courts. However, this did not relieve the Circuit Court of Appeals from applying that Section in its construction of the will in this case. Meredith v. City of Winter Haven, 320 U. S. 228 (Adv. Op. p. 6). See Petitioner's original brief, p. 14.

The balance of respondents' argument as to Section 7021 is so specious as to need no reply. There can be no question but that the bequest:

"I give to Katherine Rebecca Blacker all

household furniture, table ware pictures, silverware, & jewelery."

is clear and distinct within the meaning of Section 7021, and that it is the only bequest or devise, clear or otherwise, contained in the will.

III.

REPLY TO RESPONDENTS' CONTENTION THAT THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISION IN IN RE McLURE'S ESTATE, 63 MONT. 536, 541.

(Respondents' Brief, pp. 8-11).

Respondents, apparently, contend that Secs. 7016 to 7054 of the Revised Codes of Montana, 1935, contain all of the rules for construction of wills. They say:

> "The Montana codes (1935) contain 39 sections (7016 to 7054), setting out the commonly accepted rules for construction of wills,"
> (Resps'. Br., 8)

Upon this premise respondents then contend that the rule quoted from the decision in In re McLure's Estate, 63 Mont. 536, 541, 208 Pac. 900, 902, to the effect that the construction of a will which will disinherit heirs "is not to be favored unless the 'intention' of the testator is so expressed in clear and unequivocal language", is not the law of Montana.

They have overlooked the fact that the Montana Code "recognizes the continuance of the common law", "that the codification does not embrace the whole body of the law", and that "The rules of the

common law are not to be overturned except by clear and unambiguous language". State ex rel. La Point v. District Court, 69 Mont. 29, 34, 220 Pac. 88, 89. As pointed out at pages 19 and 20 of petitioner's original brief, the rule referred to was a part of the common law.

Respondents also contend that the rule quoted from the McLure case, upon which petitioner relies, is not the law of Montana because the question of the interpretation of the will was only "incidental" (Resps'. Br., p. 9). In the McLure case the court declared that rule in deciding that the widow became entitled to the personal property under the will and that, consequently, Sec. 10068 of the Revised Codes of Montana, 1921, which provides that relatives of the deceased are "entitled to administer only when they are entitled to succeed to his personal estate," did not apply.

In Montana Horse Products Co. v. Great Northern Ry. Co., 91 Mont. 194, 210, 7 Pac. (2d) 919, 925, the Court said:

> "All that is necessary to make a decision of this court authoritative is that there shall appear to have been an application of the judicial mind to the precise question adjudged and that the point was fully considered."

And in Union P. R. Co. v. Mason City & Ft. D. R. Co., 199 U. S. 160, 166, this Court said:

> "Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere *dictum*."

Respondents also claim that:

> "The petition here fails to point out wherein the decision here is in conflict with the body of rules of construction of wills for which the McLure case holds." (Resps. Br., p. 11)

Petitioner does not contend that the decision of the Circuit Court of Appeals is in conflict with the "body of rules of construction of wills for which the McLure case holds". There are several rules referred to in that case which can have no application in this case. The rule announced in the McLure case with which the decision of the Circuit Court of Appeals is in conflict is that a will should not be construed so as to disinherit heirs at law

> "unless the 'intention' of the testator is so expressed in clear and unequivocal language."

IV.

REPLY TO RESPONDENTS' CONTENTION THAT THERE IS "NO ISSUE OF ESSENTIAL FACT LEFT TO BE TRIED UNDER THE DECISION OF THE CIRCUIT COURT OF APPEALS."

(Respondents' Brief, pp. 11-14)

Under the above title Respondents contend that:

> "By its decision, the Circuit Court has decided this case upon appellants' (respondens') motion to dismiss the complaint for failure to state a claim upon which relief may be granted," (Resps. Br., p. 12)

By this action petitioner sought a construction of the Hauser will. By its decision the District Court denied respondents' motion to dismiss and granted

petitioner's motion for judgment on the pleadings (R. 41). Thereafter, the District Court entered judgment in favor of petitioner, wherein it adjudged that, under the will, Respondent Blacker

> "was bequeathed the household furniture, tableware, pictures, silverware and jewelry, and no more; and as to the rest, residue and remainder of his property, the said Samuel T. Hauser died intestate."

It was from this judgment that the respondents appealed to the Circuit Court of Appeals (R. 45-46), and it was this judgment which was reversed by that Court (R. 71).

The opinion of the Circuit Court of Appeals discloses that that Court did not decide the case upon the motion to dismiss. It sustained the jurisdiction (R. 62-66). It also sustained the sufficiency of the complaint for it construed the will and decided the case upon the merits (R. 66-70). While, of course, an Appellate Court may consider the question of jurisdiction and the sufficiency of the complaint upon an appeal, it is certain that the Circuit Court of Appeals did not decide this case upon Respondents' motion to dismiss.

A further and complete answer to respondents' contention is that an order denying a motion to dismiss, which motion is based upon the insufficiency of the complaint, is not appealable.

This is so fundamental as to hardly need citation of authorities but, to illustrate our point, we invite the Court's attention to Central Vermont Trans. Co.

v. Durning, (C. C. A. 2) 71 Fed. (2d) 273, 274, where the court said:

> "So far as the order appealed from denied the motion to dismiss the bill, it is not now subject to review because it is not final and the cause is still open for trial on the pleadings."

If the Circuit Court of Appeals had decided the case upon respondents' motion to dismiss the complaint for failure to state a claim upon which relief could be granted, the only decree or judgment which it could enter or direct the District Court to enter is a judgment dismissing the complaint. The decree in this case reverses the judgment of the District Court and directs that Court "to make findings and to enter judgment in harmony with the opinion of this Court". Under that mandate the District Court cannot enter a judgment of dismissal for such a judgment would not be in harmony with the opinion of the Circuit Court of Appeals.

* * * * * * * * *

Commingled with respondents' argument on the foregoing contention is their statement that:

> "the complaint alone was in question and the allegations of the answer could not have been considered by the Court, and, therefore, could not have been the basis for or material to the decision." (Resps. Br., p. 12)

Not only was it necessary for the Court to consider the allegations of the answer upon an appeal from a judgment on the pleadings, but the record conclusively shows that it did so. In its opinion the Court says: "The answer contains affirmative mat-

ter bearing on the circumstances of the testator's life", and then proceeds to summarize those allegations. (R. 60). It also said: "The situation of the testator and the circumstances of his life when the will was drawn are entirely consistent with this construction". (R. 70).

* * * * * * * * *

Respondents also contend that, in denying the petition for rehearing, the Circuit Court of Appeals necessarily held that the affirmative matters alleged in the answer are not material. The Court denied the petition for rehearing without stating any reasons therefor (R. 74), and since it had treated the affirmative allegations of the answer as material in construing the will, as disclosed by its opinion, there is no basis whatever for assuming that it had changed its opinion with reference to the materiality of those allegations. Its opinion is the law of the case.

* * * * * * * * *

In conclusion, we respectfully submit that the Petition for Writ of Certiorari should be granted.

LESTER H. LOBLE,
M. S. GUNN,
of Helena, Montana,
Attorneys for Petitioner.

C. T. BUSHA, JR.,
Great Falls, Montana,
MILTON C. GUNN,
GUNN, RASCH & GUNN,
Helena, Montana,
Of Counsel for Petitioner.